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Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS,
Respondents.

No. 374

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

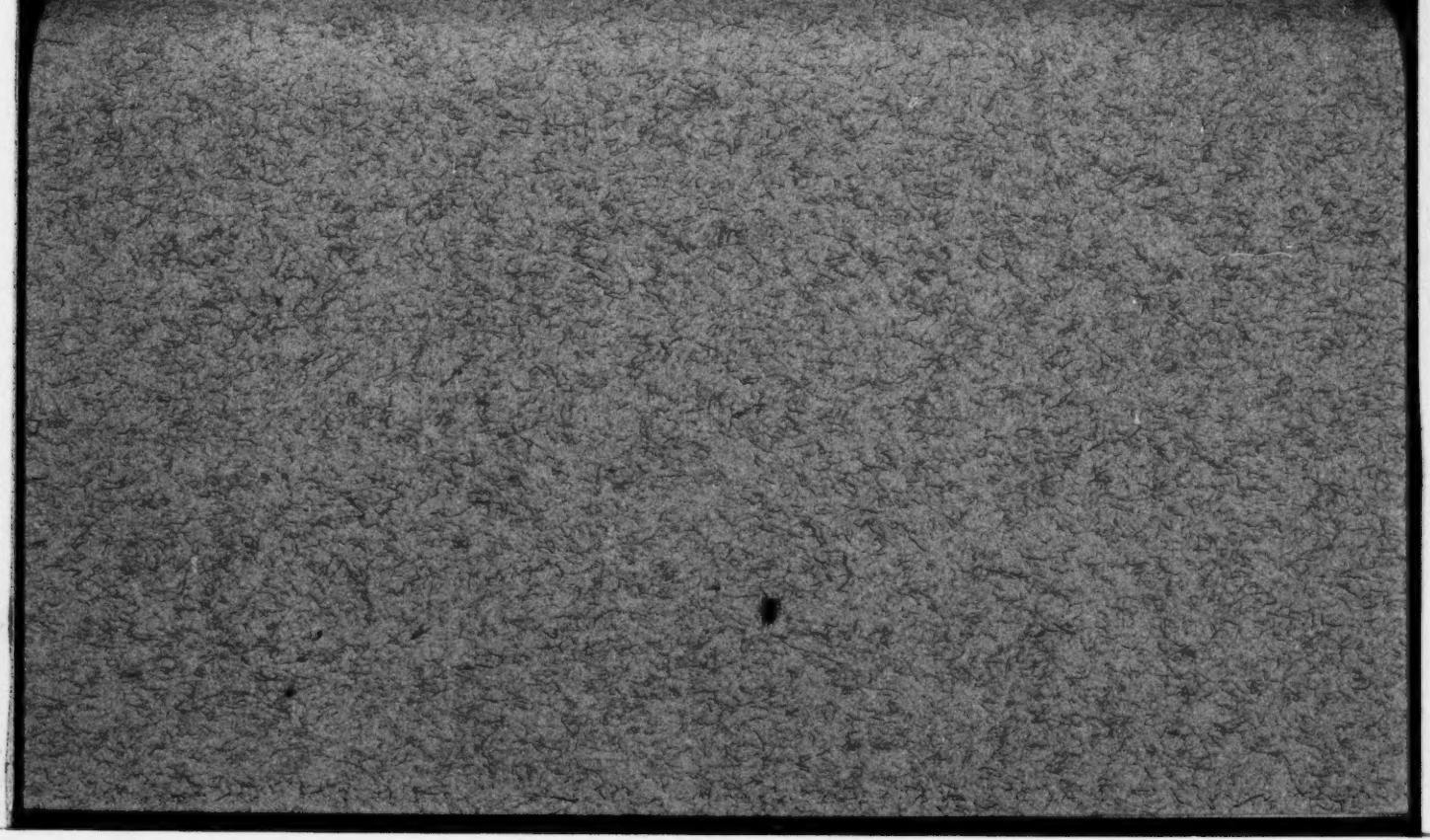
vs.

LLEWELLYN B. REAKIRT,
Respondent.

REPLY OF RESPONDENTS TO BRIEF OF GILBERT BETTMAN, ATTORNEY GENERAL OF OHIO, AMICUS CURIAE.

JOHN WELD PECK,
Attorney for Respondents.

JOHN WELD PECK,
MILTON SAYLER,
FRANK H. SHAFFER, JR.,
Of Counsel.



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Pursuant to leave granted at the time the brief of Mr. Bettman as *amicus curiae* was allowed by the Court to be filed, after the argument had begun, the following is presented in answer thereto.

The *amicus curiae* says, page 7:

> "It is this readjustment of property lines, together with restrictions where appropriate, that constitutes the public purpose which is the justification of the taking in furtherance of the improvement."

The several counsel who have filed briefs on behalf of the city or as *amici curiae* take different grounds as to the object and purpose of this condemnation. This is the natural result of the failure of the city to follow the plain provisions of Section 3679 by which it was required to *define* in its condemning resolution the *purpose* of the appropriation. (For statute, see our original brief, page 7.)

The Attorney General now suggests two public purposes, (1) the readjustment of property lines in the vicinity of the improvement; and (2) restrictions where appropriate; and says that these are "in furtherance of the improvement."

READJUSTMENT OF LOT LINES.

The readjustment of property lines is, we submit, in no wise in furtherance of the street widening, saving and excepting, of course, the taking of the actual twenty-five feet needed for that purpose. It may be in furtherance of a plan to secure the building of a larger and more handsome house on Mrs. Vester's property or on that of Mr. Richards, to take it over and resell it with other parcels to someone else, but it certainly is not in furtherance of the widening of Fifth Street. Mr. Reakirt's property will be no more handsomely improved as a result of the taking. Its location, extent and value insure a handsome improvement. But even a betterment of its prospects of improvement would not be a furtherance of the street widening.

The amendment to the Constitution of Ohio says a municipality appropriating for public use may take excess property "in furtherance of such public use." The Constitution does not say that it may take excess lands for general public benefit, and, we submit, that the rule of strict construction in dealing with language granting the right of *eminent domain* applies.

Furthermore, the language of the resolution and ordinance will be searched in vain for any declaration that the city is taking over this property for the purpose of readjusting the lot lines. Therefore we say the readjustment of lot lines is not within the purview of the Constitution of the state or of the city legislation.

RESTRICTIONS.

As a subordinate purpose the *amicus curiae* puts in: "together with restrictions where appropriate." We again invoke the statute under which this appropriation pretends to proceed. Council did not say in its resolution or ordinance that this property was taken for the purpose of restricting its future use or occupancy in any manner whatsoever. This it has not done, probably for the reason that, as a step in furtherance of the improvement, the physical situation does not permit of it. The street is simply to be widened from sixty-six to ninety-one feet, an object fully accomplished by the adding of twenty-five feet.

If an additional burden or assessment on the adjacent land, as for slope or fill, or light and air, or drainage, or for any other definite purpose, was desired, it could have been very readily specified. On the other hand, had Council specified an intention to restrict the excess, when resold, to the occupancy of buildings, to cost not less, for instance, than a million dollars and to cover not less than say, ten

thousand square feet of ground each, such restrictions would not have been in furtherance of the very simple purpose specified as the primary public use. The city, however, failed to specify any use whatever, in clear violation of the enabling act, and condemned for an undisclosed purpose, and counsel now seek conjectural purposes for support.

It is to be remembered that this property is already subject to all reasonable restrictions that may be imposed under the police power; building regulations, zoning laws, housing regulations, including the right to regulate height, set-back, open areas and character of usage. Any further restriction would tend to reduce the price on resale. Beyond the police power, for *actual* public uses lies the power of eminent domain, under which could have been taken any easement that might have been specified in furtherance of the primary use. But when all reasonable police regulations have been laid upon the land, and when the municipality has taken by eminent domain all the *definitely specified* easements that it may require for the public use, it would seem that, except for the power of taxation, what remains of the title is the inviolable private property of the owner, and that it ought not be taken from him for no specified purpose, on the vague and indefinite assertion that its taking may be for the public benefit in some way thereafter to be determined. The trial judge found not even the slightest suggestion of the nature of the restrictions to be imposed, unless restriction lay in the mere aggregation of parcels. (R. 29.)

Therefore, if the readjustment of lot lines be rejected as not in furtherance of the primary use, and if the subject of restrictions be rejected for want of substance, or for lack of specification, as required by statute, there remains no purpose for this condemnation except that of recoupment or resale for profit, which is its real object.

It is not, as the *amicus curiae* assumes, sought in these cases to enjoin the general application of the Ohio amendment for excess condemnation. The decree of the court below is directed only against the attempted taking of these three pieces of property under the particular circumstances of the record. As this Court has pointed out in *Euclid* v. *Ambler,* so frequently cited by both sides, a general enactment may be valid and the particular applications attempted under it invalid.

We submit that the purpose of justice in this case can be served by confining the amendment to its appropriate application, in accordance with its terms, viz., "in furtherance of such public use," and that the power to take property for other than public use ought not, in the language of Mr. Justice Storey in the case of *Wilkinson* v. *Leland,* 2 Peters 627, be found to lurk under any general grant of legislative authority or be implied from any general expressions of the will of the people.

Respectfully submitted,

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